SAMINATHAN GANESAN v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL CASE NO: WA-44-274-11-2019]
10 JANUARY 2020

CONSTITUTIONAL LAW: *Judicial power – Exercise of judicial power – Power to grant/refuse bail in security offences – Accused charged for security offences relating to terrorism under ss. 130J & 130JB of Penal Code and tried according to procedures provided by Security Offences (Special Measures) Act 2012 ('SOSMA') – Section 13 of SOSMA prohibits granting of bail – Whether s. 13 of SOSMA seeks to divest judicial power of Judiciary in granting/refusal of bail – Whether s. 13 of SOSMA usurpation by Parliament – Whether violation of doctrine of separation of powers – Whether s. 13 of SOSMA ultra vires arts. 8 & 121(1) of Federal Constitution*

CONSTITUTIONAL LAW: *Legislation – Ultra vires – Accused charged for security offences relating to terrorism under ss. 130J & 130JB of Penal Code and tried according to procedures provided by Security Offences (Special Measures) Act 2012 ('SOSMA') – Section 13 of SOSMA prohibits granting of bail – Whether s. 13 of SOSMA seeks to divest judicial power of Judiciary in granting/refusal of bail – Whether s. 13 of SOSMA ultra vires arts. 8 & 121(1) of Federal Constitution*

CRIMINAL PROCEDURE: *Bail – Granting of – Security offences – Accused charged for security offences relating to terrorism and tried according to procedures provided by Security Offences (Special Measures) Act 2012 ('SOSMA') – Section 13 of SOSMA prohibits granting of bail – Whether court has discretion to grant/refuse bail – Whether s. 13 of SOSMA ultra vires arts. 8 & 121(1) of Federal Constitution*

The applicant was charged at the Sessions Court for offences relating to terrorism, namely for (i) providing support to the Liberation of Tamil Elaam ('LTTE') group, an offence under s. 130J of the Penal Code ('PC'); and (ii) for possessing items related to the LTTE group, an offence under s. 130JB of the PC. These offences come within the ambit of the First Schedule to the Security Offences (Special Measures) Act 2012 ('SOSMA') which, read together with s. 3 of the SOSMA, classified offences under, *inter alia*, Chapter VIA of the PC as security offences. Therefore, a person charged with committing a security offence would be tried according to the procedures laid down in the SOSMA. It should be noted that s. 13 of the SOSMA prohibits bail to be granted to any person who is charged with any security offence. At the Sessions Court, the applicant applied to have constitutional questions be referred to the High Court. The application was allowed and two questions were referred to the present court, namely: (i) whether s. 13 of the SOSMA is *ultra vires* art. 121(1) of the Federal Constitution ('FC') ('first question'); and (ii) whether s. 13 of the SOSMA is *ultra vires* art. 8 of the FC ('second question'). The applicant argued that (i) the prohibition

against the granting of bail in s. 13 of the SOSMA was unconstitutional as the power to consider bail is a judicial power enshrined in art. 121 of the FC; (ii) any prohibition by Parliament amounts to an usurpation of judicial function by Parliament; (iii) the prohibition, as found in the SOSMA, is in violation of the principle of equality found in art. 8 of the FC; and (iv) the key authority to support the applicant's submissions may be found in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* ('*Semenyih Jaya*'). Taking the contrary stance, the respondent ('prosecution') argued that (i) s. 13 of the SOSMA does not infringe art. 8 of the FC because the basis of the difference in treatment, in that bail is prohibited for security offences, has a reasonable connection with the object of the legislation in question, which is to combat terrorism; (ii) there was no violation of art. 121 because the doctrine of separation of powers is not a provision of the FC.

Held (answering first question in affirmative without addressing second question):

(1) Article 149 of the FC expressly permits the promulgation of any Act of Parliament that is designed to stop or prevent any threat of action which is, among others, prejudicial to public order in or the security of the Federation or any part thereof. The SOSMA is one such legislation. Article 149 of the FC further states that any such law is valid notwithstanding that that new law is inconsistent with any of the four specific provisions of the FC. These are art. 5 (on no deprivation of life or personal liberty), art. 9 (no banishment or exclusion from the Federation), art. 10 (freedom of speech and expression, and right to peaceful assembly and to form associations), and art. 13 (rights to property). Given the reference to only these specific Articles of the FC, the FC must be read to mean that any new law promulgated pursuant to art. 149 of the FC, which is inconsistent with the provisions of the FC other than arts. 5, 9, 10 & 13, may potentially be held to be void to the extent of the inconsistency, pursuant to art. 4 which affirms the FC as the supreme law of the Federation. Accordingly, it was erroneous to formulate the simplistic answer to the constitutional questions referred to this court that s. 13 of the SOSMA is not unconstitutional merely because the SOSMA was enacted pursuant to art. 149 of the FC; unless the constitutional questions related to possible inconsistency of the law with any of arts. 5, 9, 10 or 13 of the FC. Here, the question was whether s. 13 of the SOSMA was *ultra vires* arts. 8 or 121. A broad-brush statement that the prohibition against bail under s. 13(2) of the SOSMA for an accused charged with a security offence is constitutionally valid because the SOSMA is a special legislation to combat terrorism enacted under art. 149 of the FC is thus misconceived. (paras 28-32)

(2) The argument that the doctrine of separation of powers is not a feature of the FC has been resoundingly discarded. There was no denying that a fundamental bulwark of a constitutional democracy is the independence of the Judiciary. However, like the doctrine of the separation of powers, this concept is nowhere stated in the FC. These, including the related basic structure doctrine, are the overarching values which are integral to the true interpretation of the FC and the proper functioning of our democracy, a construction that will prevail if this living FC of ours is properly interpreted – which ought to be in prismatic fashion. Separation of powers thus involves the division of responsibilities between the three branches of Government which prevent any one branch from performing the powers of any other, in effect entrenching a check and balance mechanism to prevent concentration of powers in any one branch. Any usurpation of the judicial power by any other arm of the Government infringes the sanctity of the doctrine of the separation of powers, violates the basic structure of the FC, and is therefore unconstitutional. As made clear by *Semenyih Jaya*, the vesting of judicial power in the Judiciary is integral to the country's constitutional framework and democratic system of Government because it is the judicial branch which is charged with the duty of checking and balancing the powers vested in these three organs of the State. It followed that the *sine qua non* for an effective discharge of this duty necessarily requires a constitutional democracy that cherishes the rule of law and upholds the independence of the Judiciary. The doctrine of the separation of powers may be differently understood by different people. That is unsurprising as the doctrine evolved out of centuries of political and philosophical development. However, for present purposes, only *Semenyih Jaya* needed to be comprehended and its lucid restatement, of the importance of constitutional supremacy, appreciated. (paras 44-46)

(3) By the doctrine of *stare decisis*, this High Court must follow the binding precedent created by these later decisions of the Federal Court. As such, it was made absolutely plain by the Federal Court in *Semenyih Jaya*, which undoubtedly bound this High Court, that under art. 121(1) of the FC, the judicial power of the courts resided in the Judiciary and no other. Judicial powers or the power to adjudicate in civil or criminal matters brought to the courts are exclusive to the courts. It was crystal clear, from *Semenyih Jaya*, that any provision that sought to remove from the courts the exercise of its discretion to grant bail was contrary to the provisions of art. 121 of the FC and could not be countenanced. It was secondary whether the power on bail was instead vested in the hands of the Public Prosecutor as the words of s. 13(2) of the SOSMA states, being the issue in these cases, or that it was not vested in any institution like now suggested by the prosecution in the instant case. The

point was the legislation, specifically s. 13 of SOSMA, sought to divest from the Judiciary its judicial power to consider whether to grant or refuse bail. (paras 49-51 & 66)

(4) It has been repeatedly affirmed by the Malaysian apex court, more notably in *Semenyih Jaya*, *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* and *Alma Nudo Atenza v. PP* that judicial power encapsulated the duty of the courts to safeguard the framework of the supremacy of the FC, which extended to the constitutional tenets and fundamental liberties enshrined therein. The Judiciary would be failing to honour its judicial oath to defend the Constitution if it permits the usurpation of the powers of any one of the three organs of the Government, contrary to the separation of powers between the three, whether or not the same is instead vested in any one other. Judicial power thus includes the power to grant or refuse bail to an accused person. It was well established that the power to grant or deny bail was in a nature of a power inherently vested in the courts. This was also well in accord with the presumption of innocence and the objective of bail which is to ensure the attendance of an accused at trial. The judicial power on bail could not therefore be absolutely prohibited by any statutory provision like the one embodied in s. 13 of the SOSMA *vis-à-vis* the offences under Chapter VIA of the Penal Code because this usurpation or removal of the power of the courts to consider bail was contrary to the judicial power being exclusively vested in the Judiciary under art. 121 of the FC and to the doctrine of the separation of powers. (paras 67 & 68)

(5) Section 13 of the SOSMA is *ultra vires* art. 121(1) of the FC as it takes away the judicial power of granting or refusing bail to an accused who is charged with a security offence under Chapter VIA of the PC which thus is tantamount to a violation of the doctrine of the separation of powers. It was not necessary to address the second question. This decision did not at all mean that the applicant herein must or should therefore be granted bail. This ruling merely reaffirmed that the power to grant bail, being a judicial power, could not be prohibited contrary to art. 121(1) of the FC. In assessing whether to grant bail, the courts will exercise their discretion judiciously, having regard to relevant considerations such as, among others, the nature and gravity of the offence, the severity of the punishment if convicted, the risk of the accused absconding, the danger of the offence being continued or repeated and the danger of the witnesses being tampered with, as well as the character, means and standing of the accused. It may probably not be easy for the courts to grant bail in security and terrorism related offences. However, it is entirely for the court hearing an application for bail to make that determination, having regard to the facts and circumstances of the case, in the exercise of the court's discretionary power. (paras 69, 70, 72 & 73)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Chow Lin Choy v. PP [2010] 9 MLJ 813 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***
Huddart, Parker and Co Pty Ltd v. Moorehead (1909) 8 CLR 330 ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Jimmy Seah Thian Heng & Ors v. PP & Other Applications [2018] 9 CLJ 769 HC ***(refd)***
Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP lwn. Lee Ngan Chea [2015] 6 CLJ 117 HC ***(refd)***
PP v. Wee Swee Siang [1948] 1 LNS 49 HC ***(refd)***
Raman Shunmugham lwn. PP [2019] 1 LNS 896 CA ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Shell Co of Australia, Ltd v. Federal Commissioner of Taxation [1931] AC 275 ***(refd)***
Soo Shiok Liong v. PP [1993] 2 CLJ 657 HC ***(refd)***
Tamil Selven Letchumenan v. PP [2019] 1 LNS 1542 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 30
Federal Constitution, arts. 4, 5, 8, 9, 10, 13, 121(1), 149(1)
Firearms (Increased Penalties) Act 1971, s. 12(2)
Penal Code, ss. 130J, 130JB
Security Offences (Special Measures) Act 2012, ss. 2, 3, 4, 12, 13(1), (2), 18A, First Schedule

For the applicant - Ramkarpal Singh, RSN Rayer, Sangeet Kaur Deo, Harshaan Zamani, Rayveni Asogan, Parkash, RA Ramu, Gayathini & Asheeq Ali; M/s Karpal Singh & Co
For the respondent - Muhamad Iskandar Ahmad, Azlina Rasdi, Aslinda Ahad, Rohaiza Abdul Rahman & Izhanudin Alias; DPP

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is a reference by the Sessions Court to the High Court pursuant to s. 30 of the Courts of Judicature Act 1964 of a question concerning the constitutionality of s. 13 of the Security Offences (Special Measures) Act 2012 which language absolutely prohibits bail for offences relating to terrorism.

[2] I decided that the said s. 13 of SOSMA is unconstitutional because it removes from the courts the power to consider bail in cases of offences relating to terrorism under the Penal Code. These are the full reasons for my decision.

Context And Background

The Accused, The Charges And The Offences

[3] The applicant is a member of the Melaka State Legislative Assembly and a member of the State Executive Council. He is one of several persons who have been charged in various Sessions Courts in this country with offences relating to terrorism – concerning support for the Liberation Tigers of Tamil Elaam ("LTTE") group.

[4] The prosecution preferred two charges against the applicant. He was specifically charged with providing support to LTTE under s. 130J of the Penal Code, and for possessing items relating to LTTE under s. 130JB of the same Code. These two charges read as follows:

> PERTUDUHAN PERTAMA
>
> Bahawa kamu pada 28 November 2018 jam lebih kurang 8.30 malam sehingga 10.50 malam bertempat di Dewan Kasturi Ayer Keroh, Jalan Utama, Taman Ayer Keroh Heights, dalam daerah Melaka Tengah, dalam negeri Melaka dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas Liberation Tigers of Tamil Eelam (LTTE) dalam satu majlis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.
>
> PERTUDUHAN KEDUA
>
> Bahawa kamu pada 10 Oktober 2019 jam lebih kurang 10.25 pagi bertempat di Pejabat Exco Perpaduan Sumber Manusia dan Hal Ehwal Pengguna, Jabatan Ketua Menteri, Kompleks Seri Negeri, dalam daerah Melaka Tengah, dalam negeri Melaka telah memiliki item-item yang berunsur perbuatan keganasan atau berkaitan dengan kumpulan pengganas Liberation Tigers of Tamil Eelam (LTTE) di dalam sebuah telefon bimbit jenama SAMSUNG GALAXY S9+ warna biru gelap No siri imei: 356810093619403 dan No imei: 356811093619401 dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 130JB(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

[5] It is useful for present purposes to appreciate the wide scope of these two provisions in ss. 130J and 130JB of the Penal Code, by referring to the provisions in entirety. Section 130J thus reads as follows:

> 130J. Soliciting or giving support to terrorist groups or for the commission of terrorist acts
>
> (1) Whoever knowingly and in any manner solicits support for, or gives support to:

(a) any terrorist group; or

(b) the commission of a terrorist act,

shall be punished with imprisonment for life or imprisonment for a term not exceeding thirty years, or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

(2) For the purposes of subsection (1), "support" includes:

(a) an offer to provide, or the provision of, forged or falsified travel documents to a member of a terrorist group;

(b) an offer to provide, or the provision of, a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;

(c) entering or remaining in any country for the benefit of, or at the direction of or in association with a terrorist group;

(d) becoming a member of or professing membership of a terrorist group;

(e) arranging, managing or assisting in arranging or managing a meeting to further the activities of a terrorist group;

(f) using or possessing property for the purpose of committing or facilitating the commission of a terrorist act;

(g) accumulating, stockpiling or otherwise keeping firearms, explosives, ammunition, poisons or weapons to further the activities of a terrorist group;

(h) arranging, managing or assisting in arranging or managing the transportation of persons to further the activities of a terrorist group;

(i) travelling to, entering or remaining in any foreign country to further the activities of a terrorist group or to commit a terrorist act;

(j) encouraging or inducing any person to leave Malaysia to further the activities of a terrorist group or to commit a terrorist act; or

(k) using social media or any other means to:

(i) advocate for or to promote a terrorist group, support for a terrorist group or the commission of a terrorist act; or

(ii) further or facilitate the activities of a terrorist group.

[6] And s. 130JB is drafted in the following terms:

130JB. Possession, etc. of items associated with terrorist groups or terrorist acts

(1) Whoever:

(a) has possession, custody or control of; or

(b) provides, displays, distributes or sells,

A any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item.

(2) In this section:

B "item" includes publications, visual recordings, flags, banners, emblems, insignia and any other thing displaying symbols associated with a terrorist group, terrorist act or ideology of a terrorist group;

"publications" includes all written, pictorial or printed matter, and C everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, or an audio recording and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof.

D

[7] Sections 130J and 130JB are housed under Chapter VIA of the Penal Code and referred to therein as "Offences Relating to Terrorism". These offences therefore come within the ambit of the First Schedule to the Security Offences (Special Measures) Act 2012 (Act 747) ("SOSMA") which, read together with s. 3 of the same Act classifies offences under, among others, E Chapter VIA of the Penal Code as security offences.

The Security Offences (Special Measures) Act 2012 (Act 747) ("SOSMA")

[8] The long title to SOSMA states that the statute provides for special measures relating to security offences for the purpose of maintaining public F order and security, and for connected matters. It is an Act of Parliament enacted pursuant to art. 149 of the Federal Constitution. More on this later.

[9] SOSMA is automatically triggered by the operation of law under s. 2, in relation to crimes which are defined under SOSMA as security offences. Security offences are listed in the First Schedule to SOSMA and in respect G of the Penal Code, are offences under Chapters VI (Offences Against the State), VIA (Offences Relating to Terrorism), which is relevant for present purposes, and VIB (Organized Crimes). A person charged with committing a security offence will be tried according to the procedures as laid down in the Act.

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[10] Despite its overarching reach, it should be highlighted that the legislation itself primarily only governs the processes relating to the trial of security offences. For example, under s. 4, upon an arrest of a person for alleged involvement in a security offence, a police officer of or above the rank of Superintendent of Police may extend the period of detention for a I period of not more than twenty-eight days, for the purpose of investigation.

[11] Another is s. 12 which provides that all security offences shall be tried by the High Court. Section 18A states that any statement by an accused whether orally or in writing to any person at any time shall be admissible in evidence. Of direct relevance, for present purposes, however, is s. 13 which prohibits bail to be granted to any person who is charged with any security offence.

The Proceedings

[12] When produced at the Kuala Lumpur Sessions Court on 29 October 2019, counsel for the applicant applied to have a constitutional question be referred to the High Court. This was allowed by the learned Sessions Court Judge under s. 30 of the Courts of Judicature Act 1964, and thereafter communicated to the High Court Registry by letter.

[13] When the matter was first mentioned at the High Court before me on 6 November 2019, given the absence of any cause papers filed by the applicant, I directed that the applicant properly formulate the questions that he wished the High Court to determine. In view of the urgency of the matter, I fixed the matter to be heard on 13 November 2019, the week after. At that first session on 6 November 2019 however, the prosecution questioned the jurisdiction of the High Court to hear a reference on a constitutional question. I therefore directed parties to file written submissions prior to the hearing date of 13 November 2019, to address both the issue of jurisdiction and the merits of the reference.

[14] On 13 November 2019 however, counsel for the applicant informed the High Court that the applicant wished to have the hearing adjourned as he had just submitted a letter of representation to the Public Prosecutor on the criminal charges preferred against him. I gave a new hearing date on 26 November 2019.

[15] The hearing proceeded on 26 November 2019, and parties on the same date filed their respective written submissions just before proceedings commenced. At the start of the hearing, the prosecution informed the High Court that it has now taken the position not to question the jurisdiction of the High Court to determine a constitutional issue upon a reference under s. 30 of the Courts of Judicature Act 1964.

The Questions For Determination

[16] Two questions were referred to this High Court upon the application by the applicant pursuant to a reference by the Sessions Court under s. 30 of the Courts of Judicature Act 1964.

[17] These are as follows:

(a) First, whether s. 13 of the Security Offences (Special Measures) Act 2012 ("SOSMA") is *ultra vires* art. 121(1) of the Federal Constitution; and

(b) Secondly, whether s. 13 of SOSMA is *ultra vires* art. 8 of the Federal Constitution.

The Crux Of The Arguments Of The Parties

[18] The position taken by the applicant is that the prohibition against the granting of bail in s. 13 is unconstitutional. The essence of this contention is that the power to consider bail is a judicial power, which is enshrined in art. 121 of the Federal Constitution, such that any prohibition of the same by Parliament amounts to a usurpation of a judicial function by Parliament. A key authority relied on by the applicant in support of the thrust of this principal submission is the landmark Federal Court decision in the case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561.

[19] It is also asserted that the prohibition as found in SOSMA is in violation of the principle of equality found in art. 8 of the Federal Constitution.

[20] The prosecution, as the respondent herein, takes the contrary stance. It argues that s. 13 does not infringe art. 8 because the basis of the difference in treatment (in that bail is prohibited for security offences) has a reasonable connection with the object of the legislation in question, which is to combat terrorism.

[21] No less significantly, the prosecution adopts the position that there is no violation of art. 121 because the doctrine of the separation of powers is not a provision of the Federal Constitution. The prosecution follows the majority decision of the Federal Court in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 which held that no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution even though it may be inconsistent with the doctrine.

Analysis Of This Court

Section 13 of SOSMA

[22] I have mentioned that s. 13 prohibits bail to one who is charged with a security offence. A full appreciation of the entirety of the provision is essential. It reads as follows:

13. Bail

(1) Bail shall not be granted to a person who has been charged with a security offence.

(2) Notwithstanding subsection (1):

(a) a person below the age of eighteen years;

(b) a woman; or

(c) a sick or an infirm person,

> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[23] Whilst s. 13(1) provides for a blanket prohibition against bail, s. 13(2) qualifies the former and specifies the categories of persons who may be considered for bail, namely, the young, women, the sick and the infirm. However, importantly, this qualification in s. 13(2) has no application to a person who is charged with a security offence under Chapter VIA of the Penal Code - Offences relating to Terrorism.

[24] As such, under s. 13 of SOSMA, the courts are absolutely prohibited from considering the grant of bail to a person who is charged with an offence under Chapter VIA of the Penal Code, like the accused now before me. It bears emphasis that offences under ss. 130J and 130JB of the Penal Code are enacted under Chapter VIA (Offences Relating to Terrorism) of the Penal Code. The applicant in this reference has been charged with offences under s. 130J for giving support to a terrorist group and under s. 130JB for possessing items associated with a terrorist group.

Article 149 Of The Federal Constitution

[25] The question posed to this court on this reference is one that can be simply stated but is not a simple one to address. But it is not entirely novel either because propositions enunciated in recent development in leading constitutional cases of the Federal Court as well as those in cases on s. 13(2) of SOSMA provide especially useful assistance to this court in its determination of the relevant issues.

[26] To start with, there can be no better introduction than the relevant provision of the Federal Constitution itself. As stated earlier, SOSMA is a piece of legislation enacted by Parliament under art. 149 of the Federal Constitution. The long title and full preamble to SOSMA read:

> An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.
>
> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia:
>
> (1) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;
>
> (2) to excite disaffection against the Yang di-Pertuan Agong;
>
> (3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or

A (4) to procure the alteration, otherwise than by lawful means, of anything by law established;

AND WHEREAS Parliament considers it necessary to stop such action; ...

B **[27]** The relevant parts of art. 149(1) of the Federal Constitution which gave birth to SOSMA read as follows:

149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

C (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races
D or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the
E Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13, or
F would apart from this article be outside the legislative power of Parliament; and art. 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

[28] Two crucial observations must be made from this plain drafting of art. 149, for present purposes. First, this provision expressly permits the
G promulgation of any Act of Parliament that is designed to stop or prevent any threat of action which is, among others prejudicial to public order in or the security of the Federation or any part thereof. SOSMA is therefore one such legislation.

[29] Secondly, art. 149 further specifically states that any such law is valid
H notwithstanding that that new law is inconsistent with any of four specific provisions of the Constitution. These are art. 5 (on no deprivation of life or personal liberty), art. 9 (no banishment or exclusion from the Federation), art. 10 (freedom of speech and expression, and right to peaceful assembly and to form associations), and art. 13 (rights to property).

I **[30]** Given the reference to only these specific articles of the Constitution, in my view, the Constitution must be read to mean that any new law which is promulgated pursuant to art. 149 which is inconsistent with the provisions

of the Constitution other than the said arts. 5, 9, 10 and 13 may potentially therefore be held to be void to the extent of the inconsistency, pursuant to art. 4 which affirms the Constitution as the supreme law of the Federation.

[31] Accordingly, it is erroneous to formulate the simplistic answer to the constitutional questions referred to this High Court that s. 13 of SOSMA is not unconstitutional merely because SOSMA was enacted pursuant to art. 149 of the Constitution. Unless the constitutional questions relate to possible inconsistency of the law with any of arts. 5, 9, 10 or 13. But here the questions concern whether s. 13 is *ultra vires* arts. 8 or 121.

[32] A broad-brush statement that the prohibition against bail under s. 13(2) of SOSMA for an accused charged with a security offence is constitutionally valid because SOSMA is a special legislation to combat terrorism enacted under art. 149 of the Constitution is thus misconceived.

Judicial Power And Separation of Powers

[33] Article 121 reads as follows:

> 121. Judicial power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.
>
> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in arts. 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Sabah and Sarawak is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Judge of the High Court.

[34] The scope of art. 121 was authoritatively examined in the landmark decision of the Federal Court in *Semenyih Jaya*, in the leading judgment written by Zainun Ali FCJ which reviewed a number of local and Commonwealth authorities and delved deep into the concepts of separation of powers, basic structure and judicial power, *albeit* not necessarily in that order. A number of important judicial pronouncements on these may be distilled from the analysis which, relevant for present purposes may be summarised in the following fashion.

[35] First, whilst the words 'judicial power' do not now feature as part of the language of art. 121 as it presently stands, having been removed from art. 121 by virtue of the Constitution (Amendment) Act 1988 (Act A704), they remain in the shoulder note of the said article. In *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; [2011] 1 MLJ 158, the Federal Court held that the provision of art. 121 of the Constitution is to be read in connection with its shoulder note, which contains the words 'judicial power', and therefore ought to be construed in this light.

[36] Secondly, in that same case, the Federal Court followed an Australian precedent in the judgment of Griffith CJ in *Huddart, Parker and Co Pty Ltd v. Moorehead* (1909) 8 CLR 330 - on the meaning of judicial power as the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action.

[37] This definition was also approved by the Privy Council in *Shell Co of Australia, Ltd v. Federal Commissioner of Taxation* [1931] AC 275. Judicial power has also been more simply described in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 as being the power vested in the court to adjudicate on civil and criminal matters brought to it.

[38] Thirdly, considering the meaning of judicial power and notwithstanding the amendments effected to art. 121 in 1988, the true remit of art. 121 is that judicial power is vested exclusively in the Judiciary. It would in this regard be remiss of me not to reproduce the relevant passages from *Semenyih Jaya* on this critical aspect *in extenso*, which clarify the position with greater lucidity, as follows:

> Judicial power is vested in the courts
>
> [66] The shoulder note in a written Constitution therefore furnishes some clue as to the meaning and purpose of the article (see also *Kok Wah Kuan* (CA) and *The Bengal Immunity Company v. The State of Bihar And Others* AIR 1955 SC 661).
>
> [67] The legal consequence is that art. 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Kok Wah Kuan* (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v. Public Prosecutor* (CA).
>
> [68] With respect, the majority decision of the Federal Court in *Kok Wah Kuan* (FC) appears to have given a narrow interpretation of art 121(1) of the Federal Constitution. It held that art 121(1) of the Federal Constitution merely declares that the High Courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'. At pp 14-15 of the judgment, Abdul Hamid Mohamad PCA (as he then was) stated that:
>
> > There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went off to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law'. In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.
> >
> > After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High

> Courts. *If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment*. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent? (emphasis added.)

[69] The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art 121(1) of the Federal Constitution suggests that the provision merely identifies the sources from which the High Courts derive their jurisdiction, namely from federal law. Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of art 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity (see the principle of law in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29).

[70] It is pertinent to now focus on the observation made by Richard Malanjum CJ (Sabah and Sarawak) in his judgment in *Kok Wah Kuan* (FC). His Lordship took the position that the specific provision on the vesting of judicial power with the High Courts in art. 121(1) of the Federal Constitution represents an important feature in a democratic system of government. The courts which form the third branch of the government has a duty 'to ensure that there is a 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them'. His Lordship observed that:

> At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

> It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country ...

...

[74] Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) the doctrine of separation of powers; and

(ii) the independence of the Judiciary.

[75] With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1).

Article 4(1) of the Federal Constitution provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[76] It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:

> The effect of sub-s 8(a) of the amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

[77] Consequentially this has the unfortunate effect of allowing the Executive a fair amount of influence over the matter of the jurisdiction of the High Court.

[78] In the past, the apex court has consistently rejected Parliamentary supremacy in giving its continuing endorsement and faint praise to the Federal Court decision in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112, in which Tun Suffian the Lord President had, in strong terms, said that:

> The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.

A [79] And again in another case, that of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ said at p. 342 that:

> … Further it is clear from the way in which the Federal Constitution is constructed there are certain features that
B constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute including one amending the Constitution that offends the basic structure may be struck down as unconstitutional … Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v. State of Kerala*
C AIR 1973 SC 1461.

...

[82] The authority of *Liyanage and Others v. Reginam* [1966] 1 All ER 650; [1967] 1 AC 259 probably summed up the concept concisely. The Privy Council in *Liyanage* held that the impugned legislation involving a
D usurpation and infringement by the Legislature of judicial powers is inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the Judiciary, manifested an intention to secure in the Judiciary a freedom from political, legislative and Executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck
E down as void.

[83] The Privy Council observed, *inter alia*, that powers in countries with written Constitutions must be exercised in accordance with the terms of the constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of judges by the
F Judicial Service Commission and it was pointed out that these provisions patently displayed an intention to secure in the Judiciary a freedom from political, Legislative and Executive control. It was said that these provisions were wholly appropriate in a constitution by which it was intended that judicial power shall vest only in the judicature; and they would be inappropriate in a constitution by which it was intended that
G judicial power should be shared by the Executive or the Legislature.

[84] Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.

H ...

[86] Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art 121(1) of the Constitution.

...

I [88] The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.

> [89] This is essentially the basis upon which rests the edifice of judicial power.
>
> [90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.
>
> [91] The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143).

[39] In other words, whilst judicial power is vested in the Judiciary and no other, judicial power is entrenched in the fundamental tenet of the independence of the Judiciary which in turn is the mainstay of the doctrine of the separation of powers. Equally crucially, and as a corollary, the vesting of the judicial power of the Federation in the courts under art. 121 together with the separation of powers between the Executive, the Legislature and the Judiciary forms the basic structure of the Constitution.

[40] This further means that the powers of one arm of the Government as constitutionally delineated cannot be exercised by any other arm. Any law which violates this separation of powers offends the basic structure of the Constitution and is therefore liable to be struck down as unconstitutional.

[41] Fourthly, the one other key observation from *Semenyih Jaya* is this. It has without any doubt manifestly departed from the majority decision of the Federal Court in *Kok Wah Kuan*, the decision heavily relied on by the prosecution in its submissions on art. 121. And *Semenyih Jaya* has been referred to with approval in subsequent judgments of the Federal Court. I need only mention two.

[42] In *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545, the Federal Court held thus:

> [36] The Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu LangaT And Another Case* [2017] 3 MLJ 561) has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art 121(1). Judicial independence and the separation of powers are recognised as features in the basic structure of the Constitution. The inherent judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism: ...

[37] The notion of the court's role, and the power of judicial review as the bulwark against unconstitutional legislation or unlawful action is echoed in the pithy remarks of Salleh Abas LP in *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 (at pp 386-387):

> The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review - a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

[38] That judicial power is vested exclusively in the Judiciary is implicit in the very structure of a *Westminster* model constitution itself, whether or not such vesting is expressly stated (*Hinds And Others v. The Queen; Director of Public Prosecutions v. Jackson; Attorney General of Jamaica (intervener)* [1977] AC 195 (at p 213)). Referring to the provisions on the appointment and removal of judges in the Constitution of Ceylon, the Privy Council held in *Liyanage v. R* [1967] 1 AC 259 (at p 287):

> Those provisions manifest an intention to secure in the Judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the Executive or the Legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature.

[43] And even more recently, in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1, on the case concerning the legality of the use of double presumption under the Dangerous Drugs Act 1952, the Federal Court again referred with approval *Semenyih Jay*a and *Indira Gandhi* as follows:

> Separation of powers in the FC
>
> [65] The ground of challenge raised calls for a proper understanding of the principle of separation of powers in our FC and the respective roles of Parliament and the courts.
>
> [66] It is well-established that 'a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles' (see *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 1 MLJ 545 at para 29). It is not to be interpreted in a vacuum without regard to the thinking in

other countries sharing similar values (see *The State v. Khoyratty* [2006] UKPC 13 at para 29). The importance of the underlying values of a constitution was noted by the Judicial Committee of the Privy Council in *Matadeen v. Pointu* [1998] UKPC 9 with these words:

> ... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.

[67] It should also be duly considered that constitutions based on the *Westminster* model are founded on the underlying principle of separation of powers with which the drafters are undoubtedly familiar. Thus, even on an independent reading of the FC, unaided by any such knowledge, the provisions therein cannot but suggest the intention to confine the exercise of legislative, executive and judicial power with the respective branches of government (see *Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan* [1932] ALR 22). The separation of powers between the three branches of government is a logical inference from the arrangement of the FC itself, the words in which the powers are vested and the careful and elaborate provisions defining the repositories of the respective powers. As such 'this cannot all be treated as meaningless and of no legal consequence' (see *R v. Kirby; Ex parte Boilermakers' Society of Australia* [1956] ALR 163).

[68] Hence, while the FC does not expressly delineate the separation of powers, the principle is taken for granted as a constitutional fundamental. The absence of express words in the FC prohibiting the exercise of a particular power by a different branch of government does not by any means imply that it is permitted ...

[69] The separation of powers between the Legislature, the Executive, and the Judiciary is a hallmark of a modern democratic State.(See *The State v. Khoyratty* at para 29; *DPP v. Mollison (No 2)* [2003] UKPC 6 at para 13; *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at para 50). Lord Steyn in *The State v. Khoyratty* at para 12 succinctly said this:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

A [70] Thus, the separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands (see: James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, The Federalist Papers No 51 (1788)).

B [71] Between the three branches of government, 'all the parts of it from a mutual check upon each other. The three parts, each part regulates and is regulated by the rest' (see *Blackstone, Commentaries* (Vol 1), 1765/1979 at p 154). The separation of powers provides a brake to the exercise of government power; the institutions are designed 'not only to co-operate C but to conflict, as part of the pulley of checks and balances' (see L Thio, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at p 160).

[72] This court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the D legality of State action, are sacrosanct and form part of the basic structure of the FC (see *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat And Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 at para 90, *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 1 MLJ 545 at paras 48 and 90).

E [73] In fact courts can prevent Parliament from destroying the 'basic structure' of the FC (see *Sivarasa Rasiah* at para 20). And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation.

F [74] The role of the judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide. As rightly stated by Professor Sir William Wade (quoted by this court in *Indira Gandhi* at para 41):

G > ... it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts.

[44] The argument that the doctrine of separation of powers is not a feature H of the Constitution has been resoundingly discarded. In my view, there is no denying that a fundamental bulwark of a constitutional democracy is the independence of the Judiciary. But like the doctrine of the separation of powers, this concept is nowhere stated in the Constitution. These, including the related basic structure doctrine, are the overarching values which are integral to the true interpretation of the Constitution and the proper I functioning of our democracy, a construction that will prevail if this living

Constitution of ours is properly interpreted - which ought to be in prismatic fashion (see the Federal Court decision in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301).

[45] Separation of powers thus involves the division of responsibilities between the three branches of Government which prevent any one branch from performing the powers of any other, in effect entrenching a check and balance mechanism to prevent concentration of powers in any one branch. Any usurpation of the judicial power by any other arm of the Government infringes the sanctity of the doctrine of the separation of powers, violates the basic structure of the Constitution, and is therefore unconstitutional. As made clear by *Semenyih Jaya*, the vesting of judicial power in the Judiciary is integral to the country's constitutional framework and democratic system of Government because it is the judicial branch which is charged with the duty of checking and balancing the powers vested in these three organs of the State. It follows that the *sine qua non* for an effective discharge of this duty necessarily requires a constitutional democracy that cherishes the rule of law and upholds the independence of the Judiciary.

[46] I do not doubt that the doctrine of the separation of powers may be differently understood by different people. That is unsurprising, for the doctrine evolved out of centuries of political and philosophical development. It may have originated in Aristotle's treatise - Politics, way back in the fourth century B.C, later developed by John Locke's *Two Treatises of Government (1689*) and expanded with refinements by Montesquieu, whose *De l'esprit des lois (The Spirit of Laws)*, published in 1748 is widely considered as the first modern formulation of the doctrine. But for present purposes, we need only comprehend *Semenyih Jaya* and appreciate its lucid restatement of the importance of constitutional supremacy.

[47] It is therefore both unfortunate and curious at the same time that the prosecution in its 50-paged written submissions and in its oral submissions at the hearing, and despite its insistence on relying on the majority decision of the Federal Court in *Kok Wah Kuan* (reported in 2007) made absolutely no mention of *Semenyih Jaya*, the decision which heralds a groundbreaking development in constitutional law in this country in recent years. Neither, it appears, did the prosecution consider that *Indira Gandhi* and *Alma Nudo Atenza* were deserving of any different treatment, despite all three of which are the much more recent as well as unanimous pronouncements of the apex court on the very same subject of art. 121, reported in 2017, 2018 and 2019 respectively, which plainly and incontrovertibly now represents the law.

[48] The prosecution did at the hearing reply to counsel for the applicant's contention on the application of *Semenyih Jaya*, by suggesting that the case concerned a different factual matrix *vis-à-vis* the Land Acquisition Act 1960. But this attempt to distinguish *Semenyih Jaya* is unsubstantiated, and in any event, its contention tenuous if not altogether flawed in the face of the judicial

analysis performed in these three Federal Court cases, as more than amply reproduced above. It does not need reminding that the clear underlying principle enunciated in *Semenyih Jaya* is that any legislation that seeks to remove from the courts any judicial power cannot be countenanced as this would be wholly inimical to the doctrine of the separation of powers.

[49] And I hardly need mention that by the doctrine of *stare decisis*, this High Court must follow the binding precedent created by these later decisions of the Federal Court. In this respect, the following observations of the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, a case referred to by the applicant, are worthy of emphasis:

> [29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment ...
>
> [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

(see also the Federal Court decision in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113).

[50] As such, it has been made absolutely plain by the Federal Court in *Semenyih Jaya* which undoubtedly binds this High Court that under art. 121(1) of the Constitution the judicial power of the courts resides in the Judiciary and no other. Judicial powers or the power to adjudicate in civil or criminal matters brought to the courts are exclusive to the courts.

[51] It bears emphasis that judicial power is central to the doctrine of the separation of powers between the Executive, the Legislature and the Judiciary which is a fundamental feature in the basic structure of the Constitution. And as highlighted by the Federal Court in *Alma Nudo Atenza*, the separation of powers between the Legislature, the Executive and the Judiciary is a hallmark of a modern democratic State.

Power To Consider Bail Is A Judicial Power

[52] The next issue to address then becomes clearer. Which is whether the power to consider bail is in the first place a judicial power.

[53] Again, I am much assisted by binding precedents. And the cases have established that the power to consider to grant or refuse bail is a power vested in the Judiciary. Zakaria Yatim J (as he then was) in *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311, a decision affirmed by the Supreme Court held to such effect in the following clear terms:

> Under our Constitution the words "judicial power of the Federation" have been defined to mean "that the court has power to adjudicate in civil and criminal matters which are brought before the Court. In criminal trials the High Court is empowered to pass sentence according to law ..." See judgment of Ajaib Singh J. in *Public Prosecutor v. Yee Kim Seng* [1983] CLJ Rep 824; [1983] 1 MLJ 252. Similarly, Tun Mohamed Suffian, in his book, *An Introduction to the Constitution of Malaysia*, 2nd. Ed. at page 97, states, "(c) its judicial power (i.e. the power to hear and determine disputes and to try offences and punish offenders) which is vested by art. 121(1) ...".
>
> In my opinion both the definitions given above are too restrictive. *In Minister of Home Affairs v. Fisher* [1980] AC 319 329, the Privy Council held that the Constitution should be interpreted with less rigidity and greater generosity than other acts of Parliament. The Constitution must not be construed in any narrow and pedantic sense. See decision of the Privy Council in *James v. Commonwealth of Australia* [1936] AC 578614. The principles of constitutional interpretation as enunciated by the Privy Council in the two cases just cited have been applied in *Merdeka University Bhd v. Government of Malaysia* [1981] 2 MLJ 356. Bearing in mind the principles of constitutional interpretation as laid down in those cases, it is proposed to state the meaning of the words "judicial power of the Federation" as contained in art. 121(1) of the Constitution.
>
> In my opinion, the term "judicial power" used in art. 121(1) means, to borrow the words of Griffith C.J. in the *Huddart*'s case, *supra*, "... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin ..." until the Court, which has the power to give a binding and authoritative decision is called upon to take action. In the context of criminal law, the Court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. Judicial power includes:

(1) the power to accept a plea of guilty after the charge has been explained to the accused and he understood it, *Heng Kim Khoon v. Public Prosecutor* [1972] 1 MLJ 30; *Munandu v. Public Prosecutor* [1984] 2 MLJ 82; *Wong Sin Yeow v. Public Prosecutor* [1968] 1 MLJ 230; and *Public Prosecutor v. Jamalul Khair* [1986] 2 MLJ 371;

(2) the power to allow or refuse a plea to be retracted and that power must be exercised judicially, *Yeoh Eng Hock v. Public Prosecutor* [1968] 1 MLJ 85;

(3) **the power to grant or refuse bail to an accused person**, *Chinnakarappan v. Public Prosecutor* [1962] MLJ 234 and *Public Prosecutor v. Latchemy* [1967] 2 MLJ 79

(4) the power to grant or refuse a postponement, *Tan Foo Su v. Public Prosecutor* [1967] 2 MLJ 19, and

(5) the power to transfer any proceedings to any other Court or to or from any subordinate Court. See item 12, Schedule to Courts of Judicature Act, 1964.

(emphasis added)

[54] The High Court in *Jimmy Seah Thian Heng & Ors v. PP & Other Applications* [2018] 9 CLJ 769; [2019] 7 MLJ 308, in a decision of my learned brother Collin Lawrence Sequerah J has also taken the view that any provision that sought to remove from the court its discretion to grant bail was contrary to art. 121 of the Federal Constitution. It is of interest that this case also dealt with the issue of bail under s. 13 of SOSMA.

[55] However, it specifically examines the provision on the qualification against blanket bail prohibition in s. 13(2) in respect of a bail application of an accused charged with a security offence under Chapter VIB (Organized Crimes). It bears repetition that this qualification in s. 13(2) has no application to security offences under Chapter VIA, which is the situation for the case presently before me.

[56] For clarity, again, s. 13(2) states:

(2) Notwithstanding subsection (1):

(a) a person below the age of eighteen years;

(b) a woman; or

(c) a sick or an infirm person,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[57] On a literal reading of the above, one who is charged with a security offence (other than specified under Chapter VIA) may be given bail if it can be shown that, for example, the accused is sick provided however there is an application by the prosecution that he be attached with an electronic monitoring device (EMD). In *Jimmy Seah*, the accused applied for bail on medical grounds but there was no application by the prosecution that he be attached with EMD.

[58] *Jimmy Seah* held that under s. 13 of SOSMA, the courts had the discretion to decide whether or not to grant bail to any of the classes of persons as categorised in s. 13(2). Should the prosecution decide not to apply for the EMD, the court could nevertheless proceed to grant bail on whatever other terms and conditions.

[59] That case further stated that a literal reading of s. 13 would produce the result that unless the prosecution applied for the EMD to be attached, the court had no discretion to grant bail. That, according to *Jimmy Seah*, would amount to removing the discretion of the courts to grant bail and placing such discretion in the hands of the prosecution. Importantly, *Jimmy Seah* also, not unexpectedly, extensively referred to *Semenyih Jaya* and stated in a conclusion to which I fully subscribe that:

> [43] Following from the decision in the *Semenyih Jaya* case and the basic propositions derived from there, it can be surmised that any provision that seeks to remove from the court an exercise of its discretion to grant bail and vest it in the hands of the PP is contrary to the provisions of art 121 of the Constitution and cannot be countenanced.

[60] The decision in *Jimmy Seah* was approved by the Court of Appeal in *Tamil Selven Letchumenan v. PP* [2019] 1 LNS 1542 where Abdul Rahman Sebli JCA (as he then was) made these observations:

> [10] There is a condition in section 13(2) of SOSMA that the grant of bail is subject to an application by the Public Prosecutor that the person be attached with an electronic device in accordance with the CPC.
>
> [11] Does this mean that bail can only be granted if there is such application by the Public Prosecutor? We do not think so, and in this regard we agree with the decision of Collin Sequerah J in *Jimmy Seah Thian Heng & Ors v. Public Prosecutor* [2018] 9 CLJ 769; [2018] MLJU 1187 that notwithstanding the absence of such application by the Public Prosecutor, the courts are still vested with the discretion to grant or not to grant bail to any of the classes of persons enumerated in section 13(2) of SOSMA.

[61] Even more directly to the point *albeit* in the context of a different legislation is a decision of the High Court in *Chow Lin Choy v. PP* [2010] 9 MLJ 813 which dealt with a provision which is drafted (like s. 13(2) of SOSMA for Chapter VIA offences) with an absolute bail prohibition that is s. 12 of the Firearms (Increased Penalties) Act 1971. It reads:

A

12. No bail to be granted in respect of offences under this Act

(1) Bail shall not be granted to an accused person charged with an offence under this Act.

(2) Subsection (1) shall apply notwithstanding any other written law or any rule of law to the contrary.

B

[62] Notwithstanding the clearly worded prohibition, which is even fortified by the *non-obstante* clause in s. 12(2) in that Act, the High Court held that the courts still had the discretion to grant bail, which it did in that case on grounds of the medical condition of the accused. Kamardin Hashim JC (as he then was) made the following observation:

C

[13] Pada pandangan saya prinsip-prinsip yang sama yang telah diputuskan di atas bagi kes-kes melibatkan tafsiran s. 41B Akta Dadah Berbahaya 1952 juga terpakai dalam kes-kes yang melibatkan tafsiran terhadap s. 12 Akta Senjata Api (Penalti Lebih Berat) 1971, termasuklah kes di hadapan mahkamah sekarang. Walau apa pun peruntukan yang

D

terdapat sama ada di bawah Akta Dadah Berbahaya mahupun di bawah Akta Senjata Api tersebut pada hemat saya apa yang lebih penting kesemuanya yang ada tidak boleh mengatasi Perlembagaan Persekutuan oleh kerana ianya adalah undang-undang tertinggi negara. Perkara yang menarik perhatian saya adalah terhadap perkara 5 dan perkara 8 yang berkaitan dengan keadilan sejagat dan kesamarataan ... .

E

[63] I should mention that the one decision under s. 13(2) of SOSMA that refused bail which is referred to by the prosecution in resisting the argument of the applicant is the High Court decision of *PP lwn. Lee Ngan Chea* [2015] 6 CLJ 117. In that case, unlike the situation before me, the security offence

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is not under Chapter VIA of the Penal Code but instead under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. This case made extensive reference to the relevant parliamentary debates in Hansard to show that the intention of the Legislature was not to allow bail for security and terrorism cases.

G

[64] For the reasons stated earlier, *Jimmy Seah* decided not to follow *Lee Ngan Chea*. The latter was in any event decided before the Federal Court decision in *Semenyih Jaya*. In addition, *Lee Ngan Chea* was referred to in a Court of Appeal case of *Raman Shunmugham lwn. PP* [2019] 1 LNS 896, where in not agreeing with the decision, Kamardin Hashim JCA held:

H

[23] Tuan TPR telah menarik perhatian kami kepada keputusan Mahkamah Tinggi dalam kes *PP lwn. Lee Ngan Chea* [2015] 6 CLJ 117. Dalam kes itu, Pesuruhjaya Kehakiman Abu Bakar Katar (ketika itu) telah menolak permohonan pemohon untuk diberi jamin walaupun pemohon seorang yang uzur dan telah berusia 70 tahun. Alasan utama penolakan

I

itu kerana Pesuruhjaya Kehakiman tersebut berpandangan bahawa jamin hanya boleh diberikan jika terdapat permohonan dari Timbalan Pendakwa Raya di bawah seksyen 13(2)(c) SOSMA untuk membebaskan pemohon atas jaminan dengan syarat dipasang dengan peranti pengawasan elektronik (electronic monitoring device).

[24] Dengan hormatnya kami tidak dapat bersetuju dengan dapatan dan keputusan Pesuruhjaya Kehakiman dalam kes *Lee Ngan Chea [supra]* tersebut. Dapatan dan pandangan serta keputusan Pesuruhjaya Kehakiman itu seolah-olahnya meletakkan kuasa dan budi bicara untuk jaminan diberikan kepada Timbalan Pendakwa Raya sedangkan kuasa itu sepatutnya berada pada Mahkamah. Melalui pembacaan kami, perkataan-perkataan "... subject to an application by the Public Prosecutor ..." hanyalah salah satu syarat bahawa sebelum Mahkamah membenarkan Pemohon diberikan jaminan, Timbalan Pendakwa Raya boleh menghendaki orang itu dipasang dengan peranti pengawasan elektronik. Sekiranya tafsiran oleh Pesuruhjaya Kehakiman itu dipakai, peruntukan seksyen-kecil (2) akan menjadi tidak berguna, sia-sia dan tidak lojik (absurd).

[65] It is true, and I readily accept that cases like *Jimmy Seah*, *Lee Ngan Chea* and the Court of Appeal decisions in *Tamil Selven Letchumenan* and *Raman Shunmugham* are not pronouncements which are precisely on point with the question to be determined in the instant case. These cases concerned security offences other than the one under Chapter VIA on offences relating to terrorism. But it cannot be denied that the essence of the proposition in these cases is very much the same with the issue now before me.

[66] For it is crystal clear from *Semenyih Jaya* that any provision that seeks to remove from the courts the exercise of its discretion to grant bail is contrary to the provisions of art. 121 of the Federal Constitution and cannot be countenanced. It is secondary whether the power on bail is instead vested in the hands of the Public Prosecutor as the words of s. 13(2) state, being the issue in these cases, or that it is not vested in any institution like now suggested by the prosecution in the instant case before me. The point is the legislation - specifically s. 13 seeks to divest from the Judiciary its judicial power to consider whether to grant or refuse bail.

[67] It has been repeatedly affirmed by our apex court, more notably in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* that judicial power encapsulates the duty of the courts to safeguard the framework of the supremacy of the Constitution, which extends to the constitutional tenets and fundamental liberties enshrined therein. The Judiciary would be failing to honour its judicial oath to defend the Constitution if it permits the usurpation of the powers of any one of the three organs of the Government, contrary to the separation of powers between the three, whether or not the same is instead vested in any one other.

[68] Judicial power thus includes the power to grant or refuse bail to an accused person. It is well-established that the power to grant or deny bail is in a nature of a power inherently vested in the courts. This is also well in accord with the presumption of innocence and the objective of bail which is to ensure the attendance of an accused at trial. The judicial power on bail cannot therefore be absolutely prohibited by any statutory provision like the one embodied in s. 13 of SOSMA *vis-à-vis* the offences under Chapter VIA

of the Penal Code because this usurpation or removal of the power of the courts to consider bail is contrary to the judicial power being exclusively vested in the Judiciary under art. 121 and to the doctrine of the separation of powers.

[69] Accordingly, my answer to the first question – whether s. 13 of SOSMA is *ultra vires* art. 121(1) of the Constitution is in the affirmative. Section 13 is unconstitutional because it divests from the courts the judicial discretionary power to evaluate whether or not to grant or refuse bail applications.

[70] This is *ultra vires* art. 121 of the Constitution as s. 13 takes away the judicial power of granting or refusing bail to an accused who is charged with a security offence under Chapter VIA of the Penal Code which thus is tantamount to a violation of the doctrine of the separation of powers.

[71] I must emphasise that this decision is not about which general considerations - liberty or security - that ought to be given preference. It is only about constitutional supremacy and applying the law as it presently stands. There is no doubt that security and safety of the nation are paramount. In my view, in any event liberty and security are reconcilable within a constitutional order that upholds the rule of law.

[72] And it is as such significant to appreciate that this decision does not at all mean that the applicant herein must or should therefore be granted bail. This ruling merely reaffirms that the power to grant bail, being a judicial power, cannot be prohibited contrary to art. 121(1) of the Constitution. In assessing whether to grant bail, the courts will exercise their discretion judiciously, having regard to relevant considerations such as, among others, the nature and gravity of the offence, the severity of the punishment if convicted, the risk of the accused absconding, the danger of the offence being continued or repeated and the danger of the witnesses being tampered with, as well as the character, means and standing of the accused (see *PP v. Wee Swee Siang* [1948] 1 LNS 49; [1948] MLJ 114 and *Soo Shiok Liong v. PP* [1993] 2 CLJ 657; [1993] 2 MLJ 381).

[73] It may well be true, as suggested by learned counsel for the applicant during submissions that it may probably not be easy for the courts to grant bail in security and terrorism-related offences. But it is entirely for the court hearing an application for bail to make that determination, having regard to the facts and circumstances of the case, in the exercise of the court's discretionary power.

Whether s. 13 Of SOSMA Is Ultra Vires Art. 8 Of The Constitution

[74] In view of my answer to the first question, it is not necessary for this court to address this second question.

Conclusion

[75] My answer to the first question – whether s. 13 of SOSMA which absolutely prohibits the courts from considering bail to an accused who is charged with an offence under Chapter VIA of the Penal Code – is *ultra vires* art. 121 of the Constitution, is in the affirmative.